

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF	:	CASE NUMBERS
	:	
JOHN MICHAEL DIERKES,	:	
	:	BANKRUPTCY CASE
	:	NO. 05-60983-MGD
Debtor.	:	
_____	:	
	:	
JOHN MICHAEL DIERKES,	:	
	:	ADVERSARY CASE
Plaintiff,	:	NO. 05-06022
	:	
v.	:	
	:	IN PROCEEDINGS UNDER
CRAWFORD ORTHODONTIC	:	CHAPTER 13 OF THE
CARE, P.C.,	:	BANKRUPTCY CODE
	:	
Defendant.	:	

ORDER

On January 20, 2005, John Michael Dierkes (“Plaintiff” or “Debtor”) commenced the above-referenced adversary proceeding by filing a complaint seeking the turnover of dental equipment and furnishings which were repossessed pre-petition by Crawford Orthodontic Care, P.C. (“Defendant”). Plaintiff requested an emergency hearing on the matter and on the afternoon of January 20, 2005, the matter came before the Court for argument. After the presentation by the parties, the Court concluded that the subject property should be turned over to Plaintiff on a conditional basis subject to a final determination as to whether the repossessed equipment and furnishings are property of the estate. The Court requested that the parties file briefs on the matter and the parties timely complied with the direction of the Court. After reviewing the record in the case and the briefs submitted by the parties, the Court has determined that the repossessed equipment and furnishings are indeed property of the estate subject to turnover.

There appears to be no dispute as to the material facts. Plaintiff is an orthodontist and TMJ specialist. In June 1999, Plaintiff purchased certain assets and accounts of an orthodontic practice from Defendant. In exchange, Plaintiff signed a promissory note for a principal sum of \$61,500, payable in monthly installments of \$1,009.24. Along with the promissory note, Plaintiff executed a security agreement, which provided that all accounts, equipment, furniture, and intangible property rights of Plaintiff's practice were to be pledged as security for the obligation. The parties do not contest the fact that Plaintiff ceased making payments on the note. On January 6, 2005, pursuant to an order entered by the State Court of Cobb County, certain collateral covered by the security agreement was repossessed with the assistance of the Fulton County Marshall's office. On January 17, 2005, Plaintiff filed a petition under chapter 13 of the Bankruptcy Code, and on January 20, he filed the complaint seeking the turnover of the equipment and furnishings which were legally repossessed by Defendant pre-petition.

The issue before the Court is whether Plaintiff had an interest in the repossessed equipment and furnishings at the time he filed his bankruptcy petition such that the subject property would be considered property of the estate subject to turnover. Generally, property of the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. *See* 11 U.S.C. § 541(a)(1). The United States Supreme Court observed in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983), that Congress broadly defined the property of the estate in § 541(a)(1) to include all tangible and intangible property interests of the debtor. 462 U.S. at 204-05. While the question whether a debtor's interest constitutes "property of the estate" is determined by federal law, "the nature and existence of the right to property is determined by looking at state law." *Bell-Tel Fed. Credit Union v. Kalter (In re Kalter)*, 292 F.3d 1350, 1353 (11th Cir. 2002); *Butner v. United States*, 440 U.S. 48 (1979).

Although not specifically asserted in his complaint, the Debtor's contention that the repossessed property must be turned over pursuant to 11 U.S.C. § 542 is predicated upon a right

of redemption retained by Debtor after the acceleration of the debt and subsequent repossession of the collateral. In Georgia, a debtor may regain possession of collateral that has been repossessed by redeeming such collateral pursuant to O.C.G.A. § 11-9-623, which states:

§ 11-9-623. Right to redeem collateral.

(a) *Persons that may redeem.* A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) *Requirements for redemption.* To redeem collateral, a person shall tender:

- (1) Fulfillment of all obligations secured by the collateral; and
- (2) The reasonable expenses and attorney's fees described in paragraph (1) of subsection (a) of Code Section 11-9-615.

(c) *When redemption may occur.* A redemption may occur at any time before a secured party:

- (1) Has collected collateral under Code Section 11-9-607;
- (2) Has disposed of collateral or entered into a contract for its disposition under Code Section 11-6-610; or
- (3) Has accepted collateral in full or partial satisfaction of the obligation it secures under Code Section 11-9-622.

Essentially, Plaintiff anticipates redeeming the subject property through his chapter 13 case by fulfilling the obligation secured by the collateral during the pendency of the three to five year plan. Defendant argues that the Plaintiff should not receive the benefit of redemption without tendering the entire balance previously accelerated.

In *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004), the Georgia Supreme Court, pursuant to a question certified by the Eleventh Circuit Court of Appeals, determined whether, under Georgia law, legal title or any other ownership interest that would give a right of possession, passed to a creditor under Georgia law upon repossession of an

automobile subsequent to a debtor's default on an automobile installment loan contract, or whether such legal title or other ownership interest remained in the debtor. In *Motors Acceptance Corp. v. Rozier*, the debtor filed a Chapter 13 bankruptcy petition four days after the creditor repossessed his automobile. The Bankruptcy Court¹ determined that by virtue of the debtor's right of redemption, the vehicle was part of the bankruptcy estate pursuant to Georgia law and therefore had to be returned to the debtor. After the District Court affirmed the Bankruptcy Court's decision, the case was submitted to the Eleventh Circuit Court of Appeals. The 11th Circuit then certified the above referenced question to the Supreme Court of Georgia. The Georgia Supreme Court answered that "ownership of collateral does not pass to a creditor upon repossession, but remains with the debtor until the creditor complies with the disposition or retention procedures of the Georgia UCC." *Rozier*, 597 S.E.2d 367.

Importantly, the Supreme Court of Georgia looked only to the provisions of revised Article 9 of the Georgia Uniform Commercial Code (O.C.G.A. § 11-9-101, *et seq.*) in concluding that ownership of collateral did not pass to the creditor merely upon repossession, but remained with the debtor until the creditor complied with the disposition and retention procedures set forth in the Georgia UCC. *Id.* at 369. The Georgia Supreme Court disagreed with the creditor's contention that the right of redemption was the debtor's sole right after repossession, and listed numerous rights still held by the debtor post repossession, including the right to demand that the creditor act with due care to preserve the collateral and the right to be notified before the creditor disposes of the collateral. *Id.* at 368. The 11th Circuit held that due to the fact that legal title and the right of redemption of the vehicle remained with the debtor even after repossession, the creditor, by refusing to return the vehicle, was found to be in willful violation of the automatic stay. The debtor was consequently permitted to provide for the repayment of the obligation through his chapter 13 plan. *Rozier v. Motors Acceptance Corp. (In*

¹ *Rozier v. Motors Acceptance Corp. (In re Rozier)*, 283 B.R. 810, 811-812 (Bankr. M.D. Ga. 2002)

re Rozier), 376 F.3d 1323 (11th Cir. 2004).

Defendant cites *In re Menasche*, 301 B.R. 757 (Bankr. S.D. Fla. 2003), in support of his contention that the debtor cannot exercise the right of redemption without undertaking the responsibilities that are attendant with the right, namely to tender fulfillment of all obligations secured by the collateral. In *Menasche*, the debtors defaulted on an automobile loan and the subject vehicle was repossessed hours prior to the filing of a chapter 13 petition. The debtors proposed to exercise their right of redemption by paying the entire remaining balance on the subject loan with interest over the course of their chapter 13 plan and not in a lump sum payment. The Court found that the debtors' proposed redemption through their chapter 13 plan did not satisfy the requirement as set forth in the Florida UCC² to "tender fulfillment of all obligations secured by the collateral" and therefore did not operate to bring the vehicle within the property of the bankruptcy estate such that the turnover can be compelled. *Id.* at 761. The *Menasche* Court found the Official Uniform Commercial Code Comment discussing the relevant section to be dispositive. The Comment states:

To redeem the collateral a person must tender fulfillment of all obligations secured, plus certain expenses. If the entire balance of a secured obligation has been accelerated, it would be necessary to tender the entire balance. A tender of fulfillment obviously means more than a new promise to perform an existing promise. *It requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured.*

Id. citing U.C.C. § 9-623 cmt. 2 (2003) (emphasis not included in original comment). The *Menasche* Court determined that even if the debtors' chapter 13 plan proposed to pay the entire redemption amount "payment over time does not equal a tender of the entire balance as described in the Official Commercial Code Comment." *Id.*

This Court respectfully disagrees with the holding of the *Menasche* Court. Debtor still

² The relevant Florida UCC provision is almost identical to the corresponding provision under Georgia law.

retains the rights conferred upon him pursuant to 11 U.S.C. §§ 1322(b)(2) and 1322(b)(3) to potentially cure the default as a function of his chapter 13 plan of reorganization and thereby negate the effect of defendant's acceleration clause. *See In re Anderson*, 29 B.R. 563 (Bankr. E.D. Va. 1983) (internal citations omitted). Even if the purchase agreement and the UCC require acceleration of the debt upon default, the plan does not have to provide for a lump sum payment of all outstanding debt owed to defendant. The Bankruptcy Code allows debtors to restructure the timing of their payments in order to facilitate the right of redemption. *Tidewater Fin. Co. v. Moffett (In re Moffett)*, 356 F.3d 518, 523 (4th Cir. 2004). Section 1322(b)(2) of the Bankruptcy Code permits debtors to modify the rights of holders of secured claims and Section 1322(b)(3) allows debtors to cure their defaults. Courts have recognized that the Bankruptcy Code allows debtors to restructure the timing of payments to secured creditors by de-accelerating debts, in order to allow debtors to regain collateral necessary to their financial reorganization. *Id.* "The right to cure default and reinstate an accelerated note is granted by federal bankruptcy law and cannot be frustrated by the law of any state. *In re Taddeo*, 685 F.2d 24, 28 (2d Cir. 1982). By allowing debtors to cure defaults in cases in which there still is a right of redemption under state law, this section [11 U.S.C. § 1322(b)(3)] furthers the intent of Chapter 13 which is to facilitate debtor rehabilitation while protecting the rights of creditors. *Taddeo* at 29." *In re Robinson*, 285 B.R. 732, 738 (Bankr. W.D. Okla. 2002).

The Debtor's proposed chapter 13 plan sets forth a dividend to unsecured creditors at fourteen percent. Schedule D states that the equipment and furnishings serving as collateral for the obligation owed to Defendant has a value of \$5,000. The Court, by ordering the turnover of the subject property, is not holding that the treatment proposed by Debtor is sufficient to satisfy the provisions of 11 U.S.C. § 1325 for the plan to be confirmed. Defendant should still take whatever action it deems necessary and appropriate regarding the potential confirmation of the plan.

The Defendant also posits a second argument, that the repossessed collateral is not

necessary for the operation of the Debtor's business, the Debtor has not offered adequate protection, and therefore that the automatic stay should be lifted as to that collateral. The Defendant contends that when the equipment and furnishings were returned, it had discovered that Plaintiff had obtained from another source a full office suite of furniture, office equipment and dental equipment (Defendant's Brief, p.9). The Court finds this argument relevant to the question as to whether relief from the automatic stay should be granted as to the subject collateral, but that it is not pertinent to the determination as to whether the equipment and furnishings are property of the estate and as a result subject to turnover. Section 362 addresses the automatic stay and specifically 11 U.S.C. § 362(d)(2) provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such by terminating, annulling, modifying, or conditioning such stay –

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

- (A) the debtor does not have an equity in such property; and
- (B) such property is not necessary to an effective reorganization.

The record reflects that Debtor filed this adversary proceeding and sought an emergency hearing based upon the fact that it considered that exigent circumstances were required in order for it to be able to obtain items essential for the day to day operation of the business. If Defendant can demonstrate that this is not the case, then perhaps it can serve as the justification for the Court to lift the automatic stay. The Court notes that Defendant does have a pending Motion for Relief from the Automatic Stay and if it desires to pursue this argument in its endeavor to obtain stay relief, then a specially set evidentiary hearing must be arranged. Accordingly, it is

ORDERED that the equipment and furnishings subject to the complaint for turnover filed by Plaintiff, John Michael Dierkes, is hereby considered to be property of the estate and rightfully subject to turnover pursuant to 11 U.S.C. § 542.

The Clerk is directed to serve the parties listed on the attached distribution list.

IT IS SO ORDERED.

At Atlanta, Georgia, this 15th day of February, 2005.

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST:

A. Keith Logue

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1170 Peachtree Street NE
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Mary Ida Townson

Chapter 13 Trustee
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